In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-53

EDWARD DEJESUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the hearsay evidence introduced at his conspiracy trial was not accompanied by a proper limiting instruction and that an indictment charging a conspiracy in violation of 21 U.S.C. 846 must allege an overt act.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of possessing cocaine with intent to distribute, and with conspiracy to do the same, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1) and 846. He was sentenced to concurrent terms of four years' imprisonment, to be followed by three years' special parole. The court of appeals affirmed (Pet. App. 13-19).

The evidence at trial established that Drug Enforcement Administration Special Agent Daniel Staffieri, acting in an undercover capacity, met with Clarke Johnson on several occasions (App. 14-15).[1] On May 3, 1974, Johnson offered Staffieri five kilograms of cocaine for $20,000 per kilogram and tendered a sample (App. 17-19, 90-91).

On May 7, 1974, Johnson called Staffieri and stated that "the stuff was in Boston" (App. 18). Later that day, after meeting with Johnson, Staffieri called again, suggesting that the deal be consummated at Pier 4, a Boston restaurant (App. 27-29). An unidentified person then came on the phone; after a short conversation between the person and Staffieri,[2] Johnson told Staffieri that three of the kilos had been sold in New York and only two remained to be sold at an increased price of $22,000 a kilo (App. 29-30). After agreeing to this price, Staffieri suggested that he meet Johnson and his companion at the Holiday Inn parking lot; Johnson agreed (App. 30).

The Holiday Inn meeting took place at 11:15 p.m.; Johnson provided another sample and suggested a later meeting, at midnight, at the Prudential Center (App. 31-32, 97). Staffieri and another agent arrived at the Prudential Center on time. Johnson approached their car five minutes later, stating that he had the cocaine but wanted to change cars (App. 32-33, 98-99). About 30 minutes later a 1966 brown Plymouth parked behind the agents' car; Johnson walked over to their car and stated that the man with the cocaine was in the vehicle behind them (App. 33-34, 99-100). Staffieri entered the Plymouth; petitioner introduced himself as "Tito" and placed a paper bag on Staffieri's lap (App. 34-35). Staffieri examined the four clear plastic bags within and asked petitioner what was in them.

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[1]Johnson, who was arrested and indicted with petitioner, was released on bail and fled. He has not been apprehended. "App." designates the appendix in the court of appeals.

[2]The trial judge would not allow Staffieri to testify about the substance of this conversation (App. 29-30).

Petitioner replied that it was "the total two kilograms altogether" (*ibid.*). Staffieri then asked about the other three kilos and petitioner stated he had already sold the other kilos in New York City (*ibid.*). Staffieri asked about the selling price; petitioner said that it was $44,000 (*ibid.*). When Staffieri asked if the cocaine was as good as the sample, petitioner volunteered that "you can cut it three times, you still should end up with 35 percent coke" (*ibid.*). Finally, petitioner offered to "deliver five kilos every ten days" (App. 36). He and Johnson were arrested on the spot.

1. Petitioner contends (Pet. 11-12) that the district court's cautionary instructions to the jury concerning the use of hearsay evidence did not adequately inform it that only nonhearsay evidence could demonstrate petitioner's connection to the conspiracy, and so allow hearsay to be considered. The record reveals, however, as the court of appeals noted (Pet. App. 17-18), that petitioner never requested such an instruction. This lack is fatal to petitioner's argument. Fed. R. Evid. 103(a)(1). Petitioner objected to any testimony concerning the agent's telephone conversations with Johnson (Pet. App. 16-17), but did not clarify the grounds of this objection.

The district court told the jury (App. 16-17):

> Anything done during the life of the conspiracy for the purpose of furthering the aims of the conspiracy, is admissible against anyone that the jury finds knowingly and voluntarily became a member of that conspiracy.
>
> The evidence which I am allowing in now as to telephone conversations between this witness and Mr. Johnson is to be considered by you when you retire to deliberate, only if you find that there was in fact a conspiracy between the defendant and Mr. Johnson and that the conversation was in furtherance of some purpose of the conspiracy and that the conversation was during the lifetime of the conspiracy.

* * * * *

> This is conditionally admissible evidence. I will instruct you to disregard the whole thing, if at the time the government rests, there isn't enough evidence from which you can find conspiracy, if you believe the evidence. Whether you do find it is a matter for your decision.

As the court of appeals noted: "Apparently satisfied with this, defense counsel remained silent" until the witness averted to another hearsay statement (Pet. App. 15). The court then reminded the jury of the limitation placed on such testimony (App. 19); petitioner never stated that he objected to the omission from the instruction of a reference to the quantum of nonhearsay testimony necessary to allow hearsay to be used. Nor did petitioner object upon this ground when the court instructed the jury, at the close of the trial, that (App. 219):

> If you find the defendant voluntarily and knowingly entered into an agreement, whether it be a formal or informal agreement or he entered into an understanding to cooperate with Johnson in selling a couple of kilos of cocaine, then you may consider those statements made by Johnson in the absence of Mr. DeJesus, if you also find those statements were made to advance some purpose or understanding or agreement, while the agreement or understanding was in effect between them.
>
> If you find the government has not proved beyond a reasonable doubt that this defendant entered into some kind of agreement with Johnson, looking toward the sale of kilos of cocaine, you are to disregard completely and not let your verdict be based on anything done by Johnson or anything said by Johnson in the absence of Mr. DeJesus.

As the court of appeals correctly noted, "it is clear that neither the court nor defense counsel had in mind the refinement" belatedly suggested (Pet. App. 17).

The omission was hardly plain error, so that it could be noticed without objection. In most courts of appeals the question of the sufficiency of the nonhearsay evidence is for the judge, not for the jury. *United States* v. *Honneus*, 508 F.2d 566, 576-577 (C.A. 1), certiorari denied April 28, 1975, No. 74-972, held (prospectively) that the jury should be allowed to make this decision. See also *United States* v. *Apollo*, 476 F.2d 156, 163-164 (C.A. 5). But petitioner was tried prior to *Honneus* and did not preserve his point.[3] It is therefore unnecessary to address the question whether *Honneus* and *Apollo* were properly decided.

2. Petitioner also contends (Pet. 5-11) that Count 1 of the indictment, which charged a conspiracy under 21 U.S.C. 846, should have alleged the commission of an overt act.[4] Because petitioner's sentence on Count 1 is concurrent with his sentence on Count 4, the Court need not consider this argument. *Benton* v. *Maryland*, 395 U.S. 784, 787-791; *Barnes* v. *United States*, 412 U.S. 837, 848. In any event, both petitioner and the court of appeals correctly observed that the statute itself does not require the allegation of an overt act (Pet. 6; Pet. App. 18 and n. 3). The only other case expressly to consider the question, *United States* v. *DeViteri*, 350 F. Supp. 550, 551-552 (E.D. N.Y.), held that an overt act need not be alleged or proved in a prosecution under 21 U.S.C. 846.

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[3]There is no doubt that ample nonhearsay evidence—under any standard of sufficiency—established petitioner's participation in the conspiracy. See Pet. App. 13-14, 17; see also pages 2-3 *supra*.

[4]Although no overt act was expressly alleged in Count 1, several overt acts eventually were proved. See Pet. App. 13-14.

Petitioner cites other cases which, he contends, are to the contrary (Pet. 5-6). But he cited the same cases to the court of appeals, which correctly observed (Pet. App. 18) that "[s]ome involve conspiracy cases brought under statutes requiring allegation and proof of overt acts, such as 18 U.S.C. §371; others involve indictments charging overt acts and the issue is whether the evidence was sufficient to prove the crime as charged [citations omitted]; still others are cases where the court seems to assume, without discussion, that an overt act must be alleged in a prosecution under 21 U.S.C. §846 [citations omitted]." The instant case marks the first explicit consideration of this question by any court of appeals. There is, perforce, no conflict among the circuits, and it is not now necessary for this Court to undertake to decide whether it will eventually be necessary to address the question.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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[5]Petitioner also seems to contend (Pet. 8-10) that Section 846 is unconstitutionally vague because it does not expressly state whether or not the indictment must allege an overt act. But this ambiguity, if any, has been cured by the decision of the court of appeals (Pet. App. 18, n. 3). Petitioner does not contend that he was prejudiced by this alleged vagueness or that he did not understand the charge he was called upon to defend; Count 1 simply alleges a conspiracy to perform the crimes and acts enumerated in Counts 2 to 4.

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